No. 82-2059

In The
Supreme Court Of The United States

OCTOBER TERM, 1982

JOHN R. BARTLETT, JR., and
FARVIEW BUILDERS CORPORATION OF CONNECTICUT
Appellants
v.
BURCH WILLIAMS,
JUDITH W. GIBBONS, and
SUZANNE W. LA PRADE
Appellees

ON APPEAL FROM THE CONNECTICUT SUPREME COURT

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

Donald A. Mitchell
Attorney for the
Appellants
P.O. Box 119
Danbury, Connecticut
06810
(203)748-2299

QUESTION PRESENTED

Is Fourteenth Amendment procedural due process satisfied when the only protection afforded the owner of land sequestered under a lis pendens statute is a post-sequestration hearing?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

OPINION BELOW

The official citation to the opinion of the Connecticut Supreme Court from which the appellant seeks review is Burch Williams et al. v. John R. Bartlett, Jr., et al., 189 Connecticut Reports 471.

JURISDICTION

This is an appeal seeking review of a judgment of the Connectiut Supreme Court, entered March 15, 1983, in which the validity of Connecticut's Lis Pendens statute (Public Act 81-8) was sustained as against a 14th Amendment Due Process challenge. Notice of appeal was filed in the Connecticut Supreme Court on June 10, 1983.

Jurisdiction of this appeal is conferred on the United States Supreme Court by United States Code Title 28, Section 1257(2).

The original underlying action has not yet gone to final judgment. The trial court has ordered that a judgment of dismissal enter on June 10, 1983 for lack of diligence in prosecution. As of the date of this writing, the appellants have not received notice that such a judgment has entered.

The status of the underlying action notwithstanding, the finality requirement is met herein by the following facts:

1. The statute creating the remedy provides that an order of the trial court granting or denying a motion to discharge a lis pendens is a final judgment for the purpose of appeal. Public Act 81-8, §4 (now Connecticut General Statutes, §52-325b).

2. The appellants' due process claim, appealable under state law, is that the lis pendens remedy, in providing no other protections

for a defendant land owner than a post-sequestration hearing, fails to adequately balance the interests of the parties. This is a separate and independent matter, collateral to the merits and not enmeshed in the factual and legal issues comprising the plaintiffs' cause of action. See, Mercantile National Bank v. Langdeau, 371 U.S. 555, 558. It must be reviewed in the state courts, if at all, by an appeal taken within seven days of the entry of the order. Public Act 81-8, §4(b). Therefore, final judgments of the state's highest court cannot be obtained in such matters at the end of the underlying action. Moreover, since a lis pendens is merged into a final judgment in the action and is collateral thereto, any error in the lis pendens order would be harmless or, perhaps, mooted. The situation is one which is capable of repetition, yet would avoid

review. To require a party in these circumstance to await review by this court until resolution of the underlying action would preclude effective review.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment XIV to the United States Constitution provides, in pertinent part:

"Section 1. ...[N]o State shall...deprive any person of...property, without due process of law...."

Connecticut Public Act No. 81-8 (now designated as Connecticut General Statutes, Sections 52-325 through 52-325d) provides, in pertinent part:

"Section 1. (a) In any action in a court of this state or in a court of the United States (1) the plaintiff or his attorney, at the time the action is commenced or afterwards, or (2)

a defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief at the time the answer is filed, if the action is intended to affect real property, may cause to be recorded in the office of the town clerk of each town in which the property is situated a notice of lis pendens, containing the names of the parties, the nature and object of the action, the court to which it is returnable and the term, session or return day thereof, the date of the process and the description of the property. Such notice shall, from the time of the recording only, be notice to any person thereafter acquiring any interest in such property of the pendency of the action; and each person whose conveyance or encumbrance is subsequently executed or subsequently recorded or whose interest is thereafter obtained, by descent or otherwise, shall be deemed to be a subsequent purchaser or

encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of the recording of such notice; provided such notice shall be of no avail unless service of the process is completed within the time provided by law. This section shall be construed to apply to mechanics' liens and all other inchoate liens, certificates of which are recorded subsequent to the recording of the notice of the pendency of the action; and, in suits to foreclose mortgages or other liens, the persons whose conveyances or encumbrances are subsequently executed or subsequently recorded shall forfeit their rights thereunder, unless they apply to the court in which such action is brought to be made

parties thereto, prior to the date when the judgment or decree in such action is rendered.

"(b) As used in this section, actions "intended to affect real property" means (1) actions whose object and purpose is to determine the title or rights of the parties in, to, under or over some particular real property; (2) actions whose object and purpose is to establish or enforce previously acquired interests in real property; (3) actions which may affect in any manner the title to or interest in real property, notwithstanding the main purpose of the action may be other than to affect the title of such real property.

"(c) Notwithstanding the provisions of subsection (a) no recorded notice of lis pendens shall be valid or constitute constructive notice thereof unless the party recording such notice, not later than thirty days after such recording,

serves a true and attested copy of the recorded notice of lis pendens upon the owner of record of the property affected thereby....

"Sec. 2. (a) Whenever a notice of lis pendens is recorded against any real property pursuant to subsection [1](a) of...this act, the property owner, if the action has not then been returned to court, may make application, together with a proposed order and summons, to the superior court for the judicial district to which the action is made returnable, or to any judge thereof, that a hearing or hearings be held to determine whether such notice of lis pendens should be discharged. The court or judge shall thereupon order reasonable notice of such application to be given to the plaintiff and shall set a date or dates for the hearing or hearings to be held thereon.... At least seven days notice shall

be given to the plaintiff prior to the date of such hearing.... (c) If the action for which such notice of lis pendens was recorded, is pending before any court, the property owner may at any time...move that such notice of lis pendens be discharged of record.

"Sec. 3. (a) Upon the hearing held on the application or motion set forth in section 2 of this act, the plaintiff shall first be required to establish that there is probable cause to sustain the validity of his claim. Any property owner entitled to notice under subsection (c) of...section 1 of this act, may appeal and be heard on the issue.

"(b) Upon consideration of the facts before it, the court or judge may: (1) Deny the application or motion if probable cause to sustain the validity of the claim is established, or (2) order such notice of lis pendens discharged of

record if probable cause to sustain the validity of the plaintiff's claim is not established.

"Sec. 4. (a) Any order entered as provided in subsection (b) of section 3 of this act shall be deemed a final judgment for the purpose of appeal.

"(b) No appeal shall be taken from such order except within seven days thereof...."

STATEMENT OF THE CASE

With the following exceptions, the facts material to consideration of the question presented are adequately set forth in the opinion of the Connecticut Supreme Court (Appendix, pages 18-20). The evidence also showed that the partnership's real properties were held by it with the intent of selling them at a profit. As of the filing of the notice of lis pendens, the properties had already been encumbered with mortgage indebtedness in order to provide the

partnership with funds with which to develop and carry them. The total mortgaged indebtedness at that time exceeded $1,500,00.00 with a monthly carrying charge of approximately $20,000.00.

Due process deficiencies in the lis pendens statute were raised orally in the court of first instance at the end of the testimony in the lis pendens discharge hearing. The court declined consideration of written memoranda from the parties and immediately issued an oral memorandum of decision in which it declined, also, to address the claimed constitutional issue. Since the notice of lis pendens was sustained, defendant/appellants' constitutional claims were necessarily rejected, sub silento. Due process deficiencies were again raised in the Connecticut Supreme Court, both in the defendant/appellants' brief and, more broadly, in oral argument. The

appellate court passed directly on the question presented and held that, in view of the nonpossessory nature of the sequestration, a post-filing hearing under the statute provides sufficient protection to the property owner to satisfy procedural due process requirements under the fourteenth amendment.

THE FEDERAL QUESTION IS SUBSTANTIAL

The question presented by this appeal is sufficiently substantial to have been partially addressed by this Court in such cases as Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 339, Lynch v. Household Finance Corporation, 405 U.S. 538, Fuentes v. Shevin, 407 U.S. 67, and Mitchell v. W.T. Grant Company, 416 U.S. 602. It involves the content of the 14th Amendment Due Process Clause as applied to the sequestration of private property. The previous

cases set forth the minimum procedural protections in various circumstances in the sense that some sort of judicial hearing was required. They left open the question of whether such a hearing, alone, adequately protects private property interests.

At stake is the enforcement of a state statute of general application which has been challenged on constitutional grounds. Just such a federal question was found to have been substantial in Lynch v. Household Finance Corporation, 405 U.S. 538, 541 at note 5. Indeed, the framers of the 14th Amendment deemed the federal interest therein to be so substantial that, in Section 5, they provided Congress with the power (and, presumably, the duty) to enforce it with appropriate legislation. The federal question presented in this appeal is so

significant and of such importance in the daily affairs of the citizens and businesses of this country that the Court should devote its resources to its resolution.

Respectfully submitted,
by the Appellants,
John R. Bartlett, Jr., and
Farview Builders Corporation
of Connecticut

By_____
Donald A. Mitchell,
their Attorney
P.O. Box 119
Danbury, Connecticut 06810

BURCH WILLIAMS ET AL. *v.* JOHN R. BARTLETT, JR., ET AL.

(10889)

SPEZIALE, C. J., PETERS, PARSKEY, SHEA and GRILLO, Js.

The statutory (Public Acts 1981, No. 81-8) lis pendens procedure may be utilized only in an action intended to affect real property. More, where a property owner seeks discharge of a notice of lis pendens, the party who filed it has the burden of establishing probable cause that he will prevail in his action.

The defendants B and F Co. appealed to this court from the trial court's judgment denying their application for discharge of a notice of lis pendens which the plaintiffs had filed in conjunction with a lawsuit against, inter alios, B and F Co. *Held:*

1. Public Acts 1981, No. 81-8 meets the minimum requirements of procedural due process, notwithstanding that fact that it provides for a hearing only after the notice of lis pendens has been filed and the further fact that it does not allow the property owner to substitute security for the lis pendens.
2. The claim of B and F Co. that the trial court's conclusion "that there was probable cause that the plaintiff will prevail in this action," was not sufficient to demonstrate probable success in an action intended to affect real property was unavailing.
3. The trial court could reasonably have found that there was probable cause that the plaintiffs would prevail in their action.

Argued December 9, 1982—decision released March 15, 1983

Action for an injunction restraining the defendants from engaging in any transaction affecting title to certain real property, to convey real prop-

*This conclusion makes it unnecessary to reach any question concerning the validity of the search of the residence on Dudley Street in which the evidence seized was generated by the search of the car.

erty, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants applied for a discharge of a notice of lis pendens which had been filed upon the bringing of the action; the court, *Sullivan, J.*, denied the application, from which the defendants appealed to this court. *No error.*

Donald A. Mitchell, for the appellants (defendants).

Carter LaPrade, for the appellees (plaintiffs).

GRILLO, J. This appeal from the trial court's judgment denying an application to discharge a notice of lis pendens raises the following issues: (1) whether the lis pendens statute comports with procedural due process guarantees; (2) whether the trial court applied the correct standard by which the propriety of a notice of lis pendens is tested; and (3) whether the evidence presented is sufficient to sustain the trial court's decision.

Th trial court could reasonably have found the following: In 1970 the plaintiff Burch Williams and the defendant John R. Bartlett, Jr. formed Barwil, Ltd., a limited partnership created under the laws of the state of Florida. The purpose of the partnership was to provide a vehicle for real estate investment. Bartlett became Barwil's general partner, while Williams became one of its limited partners. Between 1970 and 1975 Barwil acquired real property located in both Florida and Connecticut.

In 1975, it became apparent that some of Barwil's partners were interested in further investment only in relation to Florida realty, while others

wished to pursue real estate investment opportunities solely in Connecticut. Accordingly, two new limited partnerships were formed under Florida law. The Florida real estate assets of Barwil were transferred to Suni Pines, Ltd., while the Connecticut real estate held by Barwil was to be conveyed to FWZ, Ltd.[1] (hereinafter FWZ).

Under the certificate of partnership of FWZ, the three general partners of FWZ were the defendant John R. Bartlett, Jr., Barwil, Ltd., and Barwil Corporation, a Florida corporation whose president is John R. Bartlett, Jr. The plaintiff Burch Williams, a limited partner in FWZ, contributed approximately $110,000 to FWZ.

On May 13, 1981, the plaintiffs, who include Burch Williams and other limited partners of FWZ, instituted the present action against John R. Bartlett, Jr., FWZ and the Farview Builders Corporation of Connecticut, a Florida corporation whose president is John R. Bartlett, Jr.[2] The complaint alleged, inter alia, that Bartlett (1) misrepresented the assets of FWZ and Barwil, Ltd. to his limited partners with the intent that they rely *thereon*; (2) conveyed real property in Connecticut

[1] Article 5 of the Certificate of Limited Partnership of FWZ states: "Contributions by General Partners—Barwil, Ltd. shall contribute to this partnership its interest in all of the real property located in the State of Connecticut in which Barwil, Ltd. has any interest, outright, as a partner in another partnership or otherwise and its interest in all other assets relating thereto, which said properties are generally referred to as Farview Farm 106-acre residential subdivision and Georgetown I, II and III 125-acre industrial property and 140-acre residential property. Said properties are being contributed subject to all mortgages, liens and encumbrances and all other liabilities relating to said properties. Barwil Corporation shall not make a contribution to this partnership."

[2] The complaint was subsequently withdrawn as to the defendant FWZ due to a defect in service. A motion to reinstate FWZ as a party is currently pending before the trial court.

rightfully belonging to FWZ to himself or entities which he controlled, including Farview Builders Corporation, for inadequate consideration; and (3) sold or mortgaged Connecticut real property rightfully belonging to FWZ without returning the proceeds to FWZ. The complaint described the affected real property as land known as Farview Farm and Georgetown I, II and III, located in the towns of Redding and Weston, Connecticut. In their prayer for relief, the plaintiffs seek, inter alia, (1) injunctive relief restraining the defendants from engaging in any transactions affecting title to the real property pending resolution of the action; (2) an injunction compelling conveyance to FWZ of the real property rightfully belonging to it; and (3) dissolution of FWZ, with winding up by the plaintiffs.

In conjunction with their complaint, the plaintiffs caused to be filed, on May 13, 1981, a notice of lis pendens on the land records where the disputed realty is located. The lis pendens describes three separate parcels of land, one of which is divided into multiple lots. Two of these parcels are held in the name of John R. Bartlett, Jr., with the exception of three lots, which are held in the name of Farview Builders Corporation. The remaining parcel is held in the name of Barwil, Ltd.

On June 1, 1981, the defendants Bartlett and Farview Builders Corporation applied for discharge of the notice of lis pendens.[1] Public Acts 1981, No. 81-8 § 2. Hearings on the defendants' application were held before the court, *Sullivan, J.*, on June 15 and 22, 1981. After hearing the relevant

[1] As the defendant Barwil, Ltd. did not apply to discharge the notice of lis pendens, the trial court considered the validity of the lis pendens only with respect to the real property held by John R. Bartlett, Jr. and Farview Builders Corporation, and our review is similarly so limited.

evidence, the court concluded that there was probable cause that the plaintiffs would prevail in their action, and therefore denied the defendants' application for discharge of the notice of lis pendens. From this judgment the defendants take the present appeal.

The defendants first contest the constitutional validity of the lis pendens statute, General Statutes § 52-325, as amended by Public Acts 1981, No. 81-8.[4]

[4] Public Acts 1981, No. 81-8, entitled "An Act Concerning Notice of Lis Pendens," provides in pertinent part as follows:

"Section 1. (a) In any action in a court of this state or in a court of the United States (1) the plaintiff or his attorney, at the time the action is commenced or afterwards, or (2) a defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief at the time the answer is filed, if the action is intended to affect real property, may cause to be recorded in the office of the town clerk of each town in which the property is situated a notice of lis pendens, containing the names of the parties, the nature and object of the action, the court to which it is returnable and the term, session or return day thereof, the date of the process and the description of the property. Such notice shall, from the time of the recording only, be notice to any person thereafter acquiring any interest in such property of the pendency of the action; and each person whose conveyance or encumbrance is subsequently executed or subsequently recorded or whose interest is thereafter obtained, by descent or otherwise, shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of the recording of such notice; provided such notice shall be of no avail unless service of the process is completed within the time provided by law. This section shall be construed to apply to mechanics' liens and all other inchoate liens, certificates of which are recorded subsequent to the recording of the notice of the pendency of the action; and, in suits to foreclose mortgages or other liens, the persons whose conveyances or encumbrances are subsequently executed or subsequently recorded shall forfeit their rights thereunder, unless they apply to the court in which such action is brought to be made parties thereto, prior to the date when the judgment or decree in such action is rendered.

"(b) As used in this section, actions "intended to affect real property" means (1) actions whose object and purpose is to deter-

They argue that the act, which provides only for a post-filing hearing and does not contain a bonding provision or any other mechanism whereby the property owner may substitute security to obtain release of the lis pendens, in constitutionally infirm under principles of procedural due process. We disagree.

We note, first, that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Local 473* v. *McElroy*, 367 U.S.

mine the title or rights of the parties in, to, under or over some particular real property; (2) actions whose object and purpose is to establish or enforce previously acquired interests in real property; (3) actions which may affect in any manner the title to or interest in real property, notwithstanding the main purpose of the action may be other than to affect the title of such real property. . . .

"Sec. 2. (a) Whenever a notice of lis pendens is recorded against any real property pursuant to subsection (a) of section 52-325, as amended by section 1 of this act, the property owner, if the action has not then been returned to court, may make application, together with a proposed order and summons, to the superior court for the judicial district to which the action is made returnable, or to any judge thereof, that a hearing or hearings be held to determine whether such notice of lis pendens should be discharged. The court or judge shall thereupon order reasonable notice of such application to be given to the plaintiff and shall set a date or dates for the hearing or hearings to be held thereon. If such plaintiff is not a resident of this state such notice shall be given by personal service, registered or certified mail, publication or such other method as the court or judge shall direct. At least seven days notice shall be given to the plaintiff prior to the date of such hearing. . . .

"Sec. 3. (a) Upon the hearing held on the application or motion set forth in section 2 of this act, the plaintiff shall first be required to establish that there is probable cause to sustain the validity of his claim. Any property owner entitled to notice under subsection (c) of section 52-325, as amended by section 1 of this act, may appeal and be heard on the issue.

"(b) Upon consideration of the facts before it, the court or judge may: (1) Deny the application or motion if probable cause to sustain the validity of the claim is established, or (2) order such notice of lis pendens discharged of record if probable cause to sustain the validity of the plaintiff's claim is not established."

886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). Rather, it is a flexible doctrine, requiring "such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The United States Supreme Court, in *Mathews* v. *Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), created a three-part balancing test for determining what procedural safeguards are required by due process: (1) the private interests affected; (2) the risk of an erroneous deprivation of such interests by the present procedures, coupled with the probable value of additional or substitute safeguards; (3) the governmental interests, including the additional fiscal and administrative burdens which would be created by different procedural requirements. Id., 334–35; see *Society for Savings* v. *Chestnut Estates, Inc.,* 176 Conn. 563, 572–73, 409 A.2d 1020 (1979). Moreover, in the context of a challenged sequestration procedure, the court has characterized the test as whether the statutory scheme "effects a constitutional accommodation [between] the conflicting interests of the parties." *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 607, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974).

This court has previously considered the constitutional validity, under the fourteenth amendment to the federal constitution and article first, § 10 of the Connecticut constitution, of both a mechanics lien statute and the previous lis pendens statute. *Roundhouse Construction Corporation* v. *Telesco Masons Supplies Co.,* 168 Conn. 371, 362 A.2d 778, vacated, 423 U.S. 809, 96 S. Ct. 20, 46 L. Ed. 2d 29 (1975) (remanded to consider whether judgment based upon federal or state constitutional grounds, or both), aff'd on remand, 170 Conn. 155, 365 A.2d

393 (decision based on both state and federal constitutional grounds), cert. denied, 429 U.S. 889, 97 S. Ct. 246, 50 L. Ed. 2d 172 (1976) (adequate state ground); *Kukanskis* v. *Griffith*, 180 Conn. 501, 430 A.2d 21 (1980). In both decisions, we held that the absence of statutory provisions providing the property owner with a hearing "at a meaningful time and in a meaningful manner" violated due process principles under both the federal and state constitutions. *Roundhouse Construction Corporation* v. *Telesco Masons Supplies Co.*, supra, 385; *Kukanskis* v. *Griffith*, supra, 510–11.

Guided by these precedents, we turn to a consideration of whether the current lis pendens statute, with its provision for a post-filing hearing, comports with procedural due process.[5] In order to

[5] We are cognizant of the fact that several courts, when confronted with constitutional challenges to lis pendens statutes, have construed the procedure as an insufficient deprivation of property to warrant the protections of due process. E.g., *Batey* v. *Digirolamo*, 418 F. Sup. 695, 697 (D. Hawaii 1976); *Debral Realty, Inc.* v. *DiChiara*, Mass. , 420 N.E.2d 343, 348 (1981); *George* v. *Oakhurst Realty, Inc.*, 414 A.2d 471, 474 (R.I. 1980). We do not, however, subscribe to this construction. Concededly, the lis pendens procedure does not deprive a property owner of possession, use or enjoyment of the affected real estate. Nevertheless, the notice of lis pendens unquestionably interferes with an owner's right to sell or mortgage his realty and this, in our view, constitutes a sufficient deprivation so as to invoke the protections of procedural due process. *Kukanskis* v. *Griffith*, 180 Conn. 501, 509, 430 A.2d 21 (1980).

We are further cognizant of the "state action" requirement contained within the fourteenth amendment. The mere legislative authorization of the lis pendens procedure, as embodied within Public Acts 1981, No. 81-8, does not create sufficient state involvement to trigger fourteenth amendment due process protections. See *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164–66, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978). Pursuant to Public Acts 1981, No. 81-8, however, the notice of lis pendens must be filed with the clerk of the town in which the property is located, who in turn records the notice upon the land records. This participation by a public official in the deprivation of property rights creates sufficient state action to invoke the fourteenth amendment and article first, § 10, of the

determine what constitutes a hearing at a meaningful time and in a meaningful manner, we look first to the nature of the property interest affected. Certainly the deprivation caused by the notice of lis pendens is considerably less severe than a total deprivation of the property interest, where due process mandates a pre-seizure hearing. E.g., *Fuentes* v. *Shevin*, 407 U.S. 67, 96, 92 S. Ct. 1983, 32 L. Ed. 2d 556, reh. denied, 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165 (1972) (seizure of household goods). Nor can the interest at stake in the present case be construed as a deprivation of property essential to meet the owner's basic needs. See *Goldberg* v. *Kelly*, 397 U.S. 254, 264, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (termination of welfare benefits); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 341–42, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (garnishment of wages). The deprivation in *Fuentes, Goldberg* and *Sniadach* was blatant and total, thus requiring a pre-seizure hearing. The degree of deprivation under Public Acts 1981, No. 81-8, however, is at all times nonpossessory. Indeed, unless the property owner has any intention of alienating or mortgaging the realty, the effect of the lis pendens procedure is de minimis.

Turning to a consideration of the plaintiffs' interest in the procedure, we note that a notice of lis pendens ensures that the plaintiffs' claim cannot be defeated by a prejudgment transfer of the property. Because of the uniqueness of real estate, this

Connecticut constitution. See *North Georgia Finishing, Inc.* v. *Di-Chem Inc.*, 419 U.S. 601, 602–604, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1974). As the *Flagg Bros.* court noted, "[t]he constitutional protection attaches not because . . . a clerk issued a ministerial writ out of court, but because as a result of that writ the property . . . was seized . . . by the affirmative command of the [state] law . . . ." *Flagg Bros. Inc.* v. *Brooks*, supra, 161, n.10.

function is particularly important where the complaint seeks specific performance relative to the affected property. Even where the plaintiff seeks only recovery of funds allegedly invested in the burdened real estate, or where the plaintiff asserts a partial ownership interest therein, the lis pendens procedure provides security for payment of the claim pending final resolution of the case.

Moreover, the state possesses a legitimate interest in the challenged lis pendens procedure. In enacting Public Acts 1981, No. 81-8, the legislature created a specified procedure whereby the rights of third-party purchasers are readily defined. "The doctrine underlying lis pendens is that a person who deals with property while it is in litigation does so at his peril . . . ." (Citations omitted.) *Kunkanskis* v. *Griffith*, supra, 507. Further, "[i]f the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, *pendente lite*, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined." *Chrysler Corporation* v. *Fedders Corporation*, 670 F.2d 1316, 1329 (3d Cir. 1982).

In view of the limited effect caused by the filing of the notice of lis pendens upon the property of the record owner, when balanced against the interests of the state and the party utilizing the lis pendens procedure, we are unable to conclude that Public Acts 1981, No. 81-8 fails to comport with the requirements of due process. The prompt post-filing hearing afforded under the statute eliminates the risk of an erroneous deprivation of property interests. We therefore hold that General Statutes § 52-325, as amended by Public Acts 1981, No. 81-8, meets the minimum requirements of procedural due

process under the fourteenth amendment and article first, § 10 of the Connecticut constitution.*

The defendants next attack the scope of the legal standard employed by the trial court in determining the propriety of the notice of lis pendens. They assert that the conclusion of the trial court, "that there was probable cause that the plaintiff will prevail in this action," was not sufficient to demonstrate probable success in an action intended to affect real property. We disagree.

Utilization of the lis pendens procedure is, of course, restricted to those actions intended to affect real property. Public Acts 1981, No. 81-8 § 1 (a). As employed within the statute, actions intended to affect real property means, inter alia, "actions which may affect in any manner the title to or interest in real property, notwithstanding the main purpose of the action may be other than to affect the title of such real property." Public Acts 1981, No. 81-8 § 1 (a) (3). At the probable cause hearing, the plaintiffs produced the following uncontroverted evidence. The defendant Bartlett, individually and in his capacity as general partner of Barwil, Ltd. and president of Barwil Corporation, signed the certificate of limited partnership of FWZ. Article 5 thereof recites that Barwil, Ltd. will contribute its Connecticut realty, the description of which corresponds to the property presently

* Because Public Acts 1981, No. 81-8, provides a property owner with a hearing "at a meaningful time and in a meaningful manner"; *Kukanskis* v. *Griffith*, 180 Conn. 501, 509–510, 430 A.2d 21 (1980); we do not construe the absence of a bonding provision as rendering the statute constitutionally infirm. Indeed, because of the uniqueness of real property, substituting security to obtain the release of a lis pendens might impair the adequacy of the remedy for the successful litigant. See *Robert Lawrence Associates, Inc.* v. *Del Vecchio*, 178 Conn. 1, 18–19, 420 A.2d 1142 (1979).

burdened by the notice of lis pendens, to FWZ. See footnote 1. Relying on this representation, the plaintiffs invested approximately $110,000 in FWZ. On June 9, 1980, Bartlett wrote the Barwil limited partners, informing them that the Connecticut real property of Barwil, Ltd. was transferred to FWZ.[7] None of the subject properties was transferred to FWZ, although between 1976 and 1980 the defendant Bartlett made approximately 126 title transactions involving the realty subject to the lis pendens, including transfers to himself or to entities which he controlled.

Thus there was sufficient evidence presented at the hearing justifying a finding of probable cause to the effect that the defendant Bartlett misappropriated partnership property while occupying a position which equity recognizes as that of a fiduciary.[8] Such misappropriation constitutes fraud as a matter of law. *Maruca* v. *Phillips*, 139 Conn. 79, 81, 90 A.2d 159 (1952). These factors satisfy the requirements relative to the imposition of a constructive trust.[9] See *Zack* v. *Guzauskas*, 171

[7] The June, 1980 memorandum to Barwil's partners regarding the partnership's general equity and signed by the defendant Bartlett reads in pertinent part as follows: "You will recall that as of September 1, 1975, all properties were transferred to new partnerships to provide funds for carrying and other purposes. . . . The Connecticut properties were transferred to FWZ, Ltd., a Florida limited partnership, again with Barwil, Ltd. as general partner."

[8] The defendant Bartlett, as the general partner of both Barwil, Ltd. and FWZ, occupied a fiduciary position with respect to the plaintiffs, whom he owed "the duty of rendering true accounts and full information about everything which affects the partnership." *Weidlich* v. *Weidlich*, 147 Conn. 160, 164, 157 A.2d 910 (1960); see *C & S Research Corporation* v. *Holton Co.*, 36 Conn. Sup. 619, 622, 422 A.2d 331 (1980); 60 Am. Jur. 2d, Partnership § 123.

[9] Although the defendants seek to utilize the statute of frauds as a bar to any claim of relief that might affect real property, we note that the statute is not applicable to trusts arising by operation of law. *Hieble* v. *Hieble*, 164 Conn. 56, 59, 316 A.2d 777 (1972).

Conn. 98, 103–105, 368 A.2d 193 (1976); *Harper* v. *Adametz*, 142 Conn. 218, 225, 113 A.2d 136 (1955). We conclude that there was a sufficient showing of probable cause to justify the imposition of equitable relief, as sought in the complaint, affecting the title to or interests in the burdened real estate.[10]

Similarly, we are not persuaded by the defendants' final claim that there was insufficient evidence from which the trial court could find probable cause that the plaintiffs would prevail in their action. A probable cause hearing is not intended to be a trial on the merits, nor does it require the plaintiffs to establish their claims by a preponderance of the evidence. *McCahill* v. *Town & Country Associates, Ltd.*, 185 Conn. (43 CLJ 3, p. 9) 440 A.2d 801 (1981). "The task of the trial court is essentially one of weighing probabilities; that task requires the exercise of broad discretion. The court, in making its determination of probable cause, does so on the basis of the facts before it." Id.

As previously stated, the plaintiffs presented uncontroverted evidence that the defendant Bartlett fraudulently misappropriated real property rightfully belonging to FWZ. The sole witness at the probable cause hearing was the plaintiff

With respect to the defendants' claim that the statute of limitations bars the action, the letter from the defendant Bartlett to the partners of Barwil, Ltd.; see footnote 7, supra; could possibly be construed as a promise to convey the property, thus removing the bar created by the statute of limitations. See *Whitehouse* v. *Sammis*, 178 Conn. 529, 533, 423 A.2d 163 (1979). Further, "[c]ourts, applying equitable principles, have laid down the doctrine of equitable estoppel by which a defendant may be estopped by his conduct from asserting defenses such as the statute of limitations." *Morris* v. *Costa*, 174 Conn. 592, 599, 392 A.2d 468 (1978).

[10] The further claim of the defendants that Public Acts 1981, No. 81-8 does not apply to real property held as "inventory" lacks merit. The statute makes no such distinction.

Williams, whom the trial court specifically found to be honest and candid Moreover, the plaintiffs introduced over seventy-five exhibits showing title transactions made by the defendants with respect to the affected real estate. Although it was the plaintiffs' burden to establish probable cause as to the validity of their claim; Public Acts 1981, No. 81-8 § 3; the defendants did not produce any evidence to rebut the plaintiffs' contentions. Under these circumstances, we conclude that the trial court could reasonably have found as it did.

There is no error.

In this opinion the other judges concurred.

No. 10889	)	
	)	
BURCH WILLIAMS,	)	SUPREME COURT
JUDITH W. GIBBONS and	)	
SUZANNE W. LA PRADE,	)	
Plaintiff/Appellees	)	
	)	
V.	)	DANBURY JUDICIAL
	)	DISTRICT
JOHN R. BARTLETT, JR.,	)	
FARVIEW BUILDERS CORPORATION	)	JUNE 10, 1983
OF CONNECTICUT	)	
Defendant/Appellants,	)	
FWZ. LTD., Defendant	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John R. Bartlett, Jr., and Farview Builders Corporation of Connecticut, defendant/ appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Connecticut Supreme Court sustaining the validity of Connecticut Public Act No. 81-8 entered in this action on March 15, 1983.

This appeal is taken pursuant to United States Code Title 28, Section 1257(2).

John R. Bartlett, Jr., and
Farview Builders Corporation
of Connecticut

By _____
Donald A. Mitchell,
their Attorney
P.O. Box 119
Danbury, Connecticut 06810
(203)748-2299

(APPENDIX 31)

No. 82-2059

In The

Supreme Court Of The United States

OCTOBER TERM, 1982

JOHN R. BARTLETT, JR. and FARVIEW BUILDERS CORPORATION OF CONNECTICUT,
Appellants,

v.

BURCH WILLIAMS, JUDITH W. GIBBONS, and SUZANNE W. LaPRADE,
Appellees.

ON APPEAL FROM THE
CONNECTICUT SUPREME COURT

MOTION TO DISMISS OR AFFIRM

ALAN J. ROTH
Tyler Cooper & Alcorn
P.O. Box 1936
New Haven, CT 06509
(203) 789-0700

Counsel of Record for Appellees

CARTER LaPRADE
Tyler Cooper & Alcorn
P.O. Box 1936
New Haven, CT 06509
(203) 789-0700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, cont.

Statutes

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-2059

JOHN R. BARTLETT, JR. and
FARVIEW BUILDERS CORPORATION
OF CONNECTICUT,
Appellants,

V.

BURCH WILLIAMS,
JUDITH W. GIBBONS, and
SUZANNE W. LaPRADE,
Appellees.

ON APPEAL FROM
THE CONNECTICUT SUPREME COURT

MOTION TO DISMISS OR AFFIRM

The Appellees respectfully move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Connecticut Supreme Court on the

ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment require, in addition to timely notice and opportunity for a prompt evidentiary hearing provided to an affected real property owner by a lis pendens statute, that the statute also provide for bonding or some other mechanism whereby the owner may substitute security to obtain a release of the real property from the lis pendens?

2. Is the due process clause of the Fourteenth Amendment satisfied by a lis pendens statute that provides the affected real property owner with both timely notice of the recording of the

lis pendens and an opportunity for a prompt evidentiary hearing before a judge on the validity of the plaintiff's claim?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appellants' Jurisdictional Statement sufficiently sets forth the text of the constitutional and statutory provisions involved in this appeal, with the following two exceptions.

Section 1(c) of Connecticut Public Act 81-8 (now codified at Conn. Gen. Stat. § 52-325(c) (1983)) provides in full as follows:

> (c) Notwithstanding the provisions of subsection (a) no recorded notice of lis pendens shall be valid or constitute constructive notice thereof unless the party recording such notice, not later than thirty days after such recording, serves a true and attested copy of the recorded notice of lis pendens upon the

> owner of record of the property affected thereby. The notice shall be served upon the owner, if he resides in the same town in which the real property is located, by any indifferent person, by leaving a true and attested copy of such recorded notice with him or at his usual place of abode. If the property owner does not reside in such town, such copy may be served by any indifferent person, by mailing such copy, by registered or certified mail, to the owner at the place where he resides. If such copy is returned unclaimed, notice to such property owner shall be given by publication in accordance with the provisions of section 1-2. When there are two or more property owners of record, a true and attested copy of such recorded notice shall be so served on each property owner. A certified copy of the recorded notice of lis pendens, with the return of the person who served it, endorsed thereon, shall be returned to the party who recorded such notice.

Section 3(a) of Connecticut Public Act 81-8 (now codified at Conn. Gen. Stat. § 52-325b(a) (1983)), as quoted in the Appellants' Jurisdictional Statement, contains a typographical error. The word "appeal" therein should read "appear."

STATEMENT OF THE CASE

This is an appeal from the judgment of the Connecticut Supreme Court entered on March 15, 1983, finding no error in the trial court's denial of an application by the Appellants to discharge a notice of lis pendens that had been filed by the Appellees upon their commencement of the underlying action here. The facts material to consideration of the questions presented are set forth in the opinion of the Connecticut Supreme Court, on pages 11-14 and 20-23 of the Appendix to the Appellants' Jurisdictional Statement.

The Appellants, without benefit of citation to the record below, have made additional factual claims. (Jurisdictional Statement, at p. 7.) The Appellees respectfully urge that these claims be disregarded. They are immaterial

and irrelevant to the narrow issue presented by this appeal. Moreover, they are misleading: despite the Appellants' assertion that the real properties involved here were held by the partnership with the intent of selling them at a profit, the uncontroverted evidence at the hearing below showed that the partnership had never once been either a grantee or grantor of any parcel of land, and that in 27 of the 28 sales of Connecticut real property rightfully belonging to the partnership, the grantor was either Appellant Bartlett or some other entity controlled by him. (Transcript of Lis Pendens Hearing (Tr.), June 22, 1981, at pp. 6-8, 44-45.)

In addition, the Appellees respectfully wish to correct a serious error found in the section of the Juris-

dictional Statement titled "Jurisdiction." Contrary to the Appellants' representation on page 2 that "[t]he trial court has ordered that a judgment of dismissal enter on June 10, 1983 for lack of diligence in prosecution," no such judgment of dismissal was or has been entered. In fact, this action was exempted by the trial court, sua sponte, on February 3, 1983, from the Connecticut judicial system's dormancy program, due to the pendency of the Appellants' own appeal to the state's highest court, from whence the instant appeal followed. On June 21, 1983, the trial court issued two rulings denying motions addressed to the pleadings that had been filed by the Appellants and by their co-defendant below, FWZ, Ltd., thus allowing the underlying action to proceed.

ARGUMENT

A. This Court Lacks Jurisdiction to Consider the Question Presented by the Appellants.

It is well settled that "unless a federal question was raised and decided in the state court below, '[this Court's] appellate jurisdiction fails.'" Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), quoting Crowell v. Randell, 35 U.S. (10 Pet.) 368, 391 (1836). While the Appellees are uncertain as to precisely what question the Appellants seek to have this Court decide, it appears that the question presented in their Jurisdictional Statement is far broader than that actually presented to and decided by the Connecticut state courts.

The only issue with which the Appellants have been concerned until now is the lack of a bonding provision or

some other mechanism in the challenged lis pendens statute whereby an owner of real property may substitute security to obtain a release of the property from the lis pendens. An examination of the particularity with which counsel for the Appellants framed the issue in the state courts will immediately highlight the comparative breadth and lack of clarity in the question presented here.

Appellants' constitutional argument in the trial court consisted entirely of the following:

> The last point, your Honor, is that it appears that, under the circumstances here, the lis pendens would seem to deny a property holder Defendant due process in that there is no opportunity to bond out from under it, as in the domestic relations lis pendens. This is an ongoing business for purposes of which is to transfer properties to make a profit, and to make money on inventory. I don't believe that lis pendens statute is meant to cover these circumstances. The real estate here is not unique to

the parties. (Tr., June 22, 1981, at p. 57) (emphasis added).

Similarly, in their brief to the Connecticut Supreme Court, the Appellants contended:

> The lis pendens procedure authorized by 81 P.A. 8 provides for a taking of real property for an indeterminate period of time pending the outcome of litigation. It provides for a judicial determination of probable cause, after the fact, but does not protect the owner, by bond or otherwise, against damages from an unsupportable action "intended to affect real property". Such a protection appears to fall within the general constitutional due process requirements as enunciated by this Court in Roundhouse Construction Corporation v. Telesco Masons Supplies Co. (1975) 168 Conn. 371, 382.
>
> Conversely, the filing of a lis pendens without an opportunity to free the property by substituting security, is a taking of property by State authority and is within the purview of the Due Process Clause of both the federal and state constitutions. . . .
>
> . . . [I]t should be incumbent upon the party burdening property with a notice of lis pendens to show the novelty of the res so as

> to justify the lis pendens procedure absent a bonding provision. Otherwise, the present scheme seems to transgress current notions of due process. (Brief of Defendant-Appellants at p. 6, Williams v. Bartlett, 189 Conn. 471 (1983) (footnote and citations omitted) (emphasis added)).

The Connecticut Supreme Court, which heard oral argument in the case, quite obviously understood the narrow scope of the Appellants' issue on appeal, stating:

> The defendants first contest the constitutional validity of the lis pendens statute, § 52-325, as amended by Public Acts 1981, No. 81-8. They argue that the act, which provides only for a post-filing hearing and does not contain a bonding provision or any other mechanism whereby the property owner may substitute security to obtain release of the lis pendens, in [sic] constitutionally infirm under principles of procedural due process. We disagree. (Appendix to Jurisdictional Statement, at pp. 14-15 (footnote omitted) (emphasis added)).

The Connecticut Supreme Court then reviewed the relevant case law to deter-

mine whether due process required the mechanisms for which the Appellants contended, and answered in the negative:

> Because Public Acts 1981, No. 81-8, provides a property owner with a hearing "at a meaningful time and in a meaningful manner" . . . we do not construe the absence of a bonding provision as rendering the statute constitutionally infirm. Indeed, because of the uniqueness of real property, substituting security to obtain the release of a lis pendens might impair the adequacy of the remedy for the successful litigant. (Appendix to Jurisdictional Statement, at p. 20 n.5 (citations omitted) (emphasis added)).

The question presented by the Appellants to this Court is ambiguous in that it gives no hint of what additional process the Appellants contend is due them. As currently framed, the Appellants could argue here for a veritable multitude of "protections" never mentioned by them below and on which the state courts have had no opportunity to

pass. For this reason, the Appellees respectfully submit that this Court lacks jurisdiction to consider this appeal and that the appeal should therefore be dismissed.

B. The Appeal Should Be Dismissed For Want of a Substantial Federal Question.

Even if the question raised by the Appellants is narrowly construed so as to favor jurisdiction here, their appeal presents no substantial federal question not previously decided by this Court. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972), quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223,

233 (1864).

"Due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In no case, however, has this Court suggested that a due process decision turned on anything but the timing, quality and integrity of the notice and hearing afforded by the state to an affected party.

The Appellants argue that a bonding or similar substituted security device rises to the level of constitutional necessity in a lis pendens statute, even where, as in this case, the statute provides for timely notice and a prompt evidentiary hearing before a judge at which the plaintiff bears the burden of establishing probable cause to sustain the validity of his or her claim. The

Appellants' contention twists the flexible concept of due process beyond recognition. They would have this Court, in effect, rewrite decades of firmly established law holding that due process requires only notice calculated to inform the recipient of the pending matter or proceeding, see Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950), and "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" Parratt v. Taylor, 451 U.S. 527, 540 (1981), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

"[T]he two central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process."

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). With respect to the first of these concerns, substitution of a bond or other security by the Appellants would not prevent a deprivation; it would merely permit the Appellants conveniently to select the property of which they choose to deprive themselves. By contrast, notice and the opportunity for a hearing are truly the mechanisms by which unjustified or mistaken deprivations may be prevented.

With respect to the second due process concern -- "promotion of participation and dialogue by affected individuals in the decisionmaking process," Marshall v. Jerrico, Inc., supra, 446 U.S. at 242 -- these Appellants in particular are in no position to complain. In spite of the fact that the hearing below was held at their request and despite

the judge's implication that Appellant Bartlett's attendance would be appropriate, Bartlett did not appear. (Tr., June 15, 1981, at p. 10; see Appendix to Jurisdictional Statement, at pp. 22-23). As a result, the only evidence presented at the hearing came from the testimony of Appellee Williams, whom the trial court explicitly found to be "a very honest individual and quite candid." (Tr., June 22, 1981, at p. 60; see Appendix to Jurisdictional Statement, at pp. 22-23).

Viewed against this background, it is ironic that the Appellants now argue that the hearing held below provided them with insufficient protection. In these circumstances, the Appellants are peculiarly unworthy of this Court's attention and its valuable, limited time. Given the plethora of cases

holding that due process requires only notice and the opportunity for a meaningful hearing, the Appellants' failure to take full advantage of the process already afforded them, and the absence of any congruence between the additional measures they seek and the core concerns of the due process clause, this appeal should be dismissed for want of a substantial federal question.

C. The Connecticut Lis Pendens Statute Provides Due Process of Law.

Even if this Court finds that it has jurisdiction to consider this appeal, the decision below should be affirmed on the merits. The particular requirements of due process in a given case are determined by the test this Court set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), not cited by the Appellants in their Jurisdictional Statement. Three

factors are balanced in this test:

> first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335.

The private interests affected by a notice of lis pendens are those of the real property's owner of record and the plaintiff in the underlying suit. When a notice of lis pendens is filed, the ability of the record owner to alienate or encumber the land is diminished. This loss, though real, is nevertheless quite limited.

First, any deprivation is far from total. Unlike the plaintiffs in Fuentes v. Shevin, supra, and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419

U.S. 601 (1975), the owner of record here retains full use and possession of the property until the underlying claim is resolved. As the Connecticut Supreme Court pointed out, the deprivation "is at all times nonpossessory." (Appendix to Jurisdictional Statement, at p. 18). (For this reason, it is incorrect for the Appellants to refer to the lis pendens as effecting a "sequestration" of property.)

Moreover, as the Connecticut Supreme Court recognized, the type of property in question here is not "property essential to meet the owner's basic needs." (Appendix to Jurisdictional Statement, at p. 18). Hence, the instant case is distinguishable from Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (wages).

Finally, by providing for a prompt

judicial hearing on the legitimacy of the lis pendens notice, the Connecticut statute ensures that any wrongful deprivation will be of very short duration. In sum, the interest of the owner of record in a notice of lis pendens when first filed is relatively minor.

By comparison, the plaintiff's interest in the lis pendens procedure is substantial. As this Court recognized in Mitchell v. W.T. Grant Co., 416 U.S. 600, 608-09 (1974), there is a "real risk" in cases of disputed ownership that the party in possession of the property "will conceal or transfer [it] to the damage of the [claimant]." The consequences of such a wrongful transfer are greatest when, as here, the disputed property is real estate, which, by definition, is unique. The Connecticut Supreme Court so held, as a matter of

state law, in this very case. (Appendix to Jurisdictional Statement, at pp. 18-19, 20 n.5). Hence, the minimal adverse impact of a lis pendens notice on record owners is heavily outweighed by the protection it affords claimants.

The Connecticut lis pendens statute is also sensitive to the risk of erroneous deprivation. It requires that formal notice be served upon a resident property owner, in the same manner as is required for the commencement of a lawsuit in Connecticut, within thirty days of the recording of a notice of lis pendens. P.A. 81-8, § 1(c) (now codified at Conn. Gen. Stat. § 52-325(c) (1983)). A non-resident owner must be served, within thirty days as well, by registered or certified mail. Id. The statute allows the owner of record immediately to file

an application in the Connecticut Superior Court for discharge of the lis pendens. Id. § 2 (now codified at Conn. Gen. Stat. § 52-325a (1983)). Indeed, a hearing may be requested and held even before the plaintiff's writ, summons and complaint are returned to court. Id. § 2(a) (now codified at Conn. Gen. Stat. § 52-325a(a) (1983)). At the hearing on such application, the plaintiff bears the burden of establishing "that there is probable cause to sustain the validity of his claim." Id. § 3(a) (now codified at Conn. Gen. Stat. § 52-325b(a) (1983)). Thus, a full evidentiary hearing is made available to the record owner in a timely fashion, minimizing the duration of any deprivation caused by an erroneously filed notice of lis pendens.

In addition, the Connecticut statutory scheme strongly discourages the

incidence of wrongful lis pendens deprivations. Because the plaintiff must give prompt notice of the lis pendens and, if challenged, demonstrate its legitimacy to a judge, a plaintiff who records a notice of lis pendens on insufficient grounds gains nothing. And, by allowing recovery for abuse of process, Varga v. Pareles, 137 Conn. 663, 667 (1951); see Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475 (1980), Connecticut common law provides a positive disincentive to the improper filing of lis pendens notices.

Furthermore, the value of additional procedures in the context of this case is minimal. Bonding is simply not a material component of due process, see Section B, supra, and would undercut the function of the lis pendens itself by allowing the substitution of money for

the unique land supposedly protected by the lis pendens notice. The unavailability of a hearing until after the notice of lis pendens has been recorded is likewise not determinative here. As this Court recently explained:

> [W]e have rejected the proposition that [being heard] "at a meaningful time and in a meaningful manner" always requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing . . . and the assumption that at some time a full and meaningful hearing will be available. Parratt v. Taylor, supra, 451 U.S. at 540-41 (emphasis in original).

This is precisely such a case. The primary purpose of the lis pendens procedure is to protect the claimant's interest in land involved in a legal dispute. Requiring notice and a hearing prior to recording a lis pendens would invite the very transfer that would de-

feat that interest. Furthermore, as detailed above, Connecticut promptly provides the affected property owner with a "full and meaningful hearing."

Finally, the state has a significant interest in retaining the current lis pendens procedure. Absent some method of securing real property until the dispute in which it is involved is resolved, the rights of plaintiffs and third-party purchasers alike would be thrown into confusion. Connecticut clearly has the right to use reasonable means to prevent such uncertainty. See Appendix to Jurisdictional Statement, at p. 19.

In sum, while the existing lis pendens process exposes the property owner of record to a limited risk of mistaken deprivation, that potential deprivation is of minor and short-lived

nature. Meanwhile, the statute at issue here protects important interests of both the plaintiff and the state. Eliminating the risk to the property owner would destroy this protection, and thus, defeat the very purpose of the lis pendens statute. For these reasons, additional procedures are not required by the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Appellees respectfully submit that this appeal should be dismissed or, in the alternative, that the judgment of the Connecticut Supreme Court should be affirmed.

Respectfully Submitted,

THE APPELLEES,
BURCH WILLIAMS,
JUDITH W. GIBBONS, AND
SUZANNE W. LaPRADE

By_____

ALAN J. ROTH
Tyler Cooper & Alcorn
205 Church Street
P.O. Box 1936
New Haven, CT 06509
(203) 789-0700

--Counsel of Record
for Appellees--

CARTER LaPRADE
Tyler Cooper & Alcorn
205 Church Street
P.O. Box 1936
New Haven, CT 06509
(203) 789-0700

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing were mailed, first class postage prepaid, to Donald A. Mitchell, Esquire, Attorney for the Appellants, P.O. Box 119, Danbury, Connecticut 06810, this 8th day of July, 1983.

/s/ Alan J. Roth
Attorney